IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 797.

ALBERT A. CARMICHAEL, as Attorney General of the State of Alabama, *et al.*, *Appellants*,

v.

GULF STATES PAPER CORPORATION.

ADDENDUM TO BRIEF FOR APPELLEE.

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INDEX

ADDENDUM TO INDEX.

Part I: Page

(q) The decision in Dayton Goose Creek Railway Company v. United States, 263 U. S. 456 does not sustain appellants' contention as to due process 125

Part III:

(p) The decisions of the Supreme Court of Canada and the Privy Council in the matter of the Canadian Unemployment and Social Insurance Law of 1935 and related questions referred under the Supreme Court Act are impressive precedents under the British-North America Act of 1867, establishing a Federal system in Canada, as to the lack of national competence to deal with unemployment insurance, either through a compulsory tax device or under the guise of appropriating national funds..... 129

(The following references supplement Index and Table of Cases in the original brief for Appellee.)

STATUTES CITED.

Alabama Unemployment Compensation Law, Approved Sept. 14th, 1935, Gen. Acts 1935, p. 950 .....Passim

Federal Social Security Act (Act Pub. No. 271, 74th Cong., H. R. 7260, approved August 14, 1935, 49 Stat. 620, 42 U. S. C. A., §§ 501-503, 1101-1110..Passim

Alabama Acts Ex. Sess. 1932, p. 12 25

Alabama Acts Ex. Sess. 1932, p. 36 26

Bituminous Coal Conservation Act of 1935 77

Kentucky:

Act approved Dec. 29, 1936 91

Ohio:

Act approved Dec. 17, 1936 92

MISCELLANEOUS

Page

Texas:
Act approved Oct. 27, 1936 92
Indiana:
Ch. 4, L. 1936, amended by Ch. 125, L. 1937..... 92
Idaho:
Ch. 12, Laws of 1936 93
South Carolina:
Act 768, approved June 6, 1936 93
South Dakota:
Act approved Oct. 27, 1936 94
Transportation Act of 1920, Sec. 15(a), 41 Stat. 456, 489-91 .....(Addendum) 125
Constitution of Alabama (1901):
Sec. 23 .....9, 14, 17
Sec. 70 11
Sec. 72 29
Sec. 73 29
Constitution of the United States:
Art. I, Sec. 2, Cl. 3 105
Art. I, Sec. 9, Cl. 4 105
Art. I, Sec. 8, Cl. 1 115
Art. 2, Sec. 3 77
Amendments V, X, XIV .....Passim
British North America Act, 1867, 30 Vict. Cap. 3.... 129
President's Message of June 8, 1934 77
Report of President's Committee on Economic Security, transmitted to Congress with the President's Message of January 17, 1935, H. Doc. No. 81, 74th Cong., 1st Session 77, 78, 85, 86, 88, 115, 119
House Report No. 615, 74th Cong., 1st Sess. 77, 119, 120
Senate Report No. 628, 74th Cong., 1st Sess. 77, 80, 119
Message of Governor of Illinois, January 11, 1937.... 91
Thomas Jefferson, Letter to Giles, Dec. 26, 1825..... 65
Federal Social Security Board: Information Service.. 95
Congressional Record, Vol. 79, Pt. 5, Col. 2, p. 5781..81, 120
Hon. Carter Glass, Address of March 30, 1937..... 64
House Hearings, Return of Railroad to Private Ownership, 1919, Vol. 3, p. 2981 .....(Addendum) 128

ADDENDUM TO TABLE OF CASES

Page

Dayton-Goose Creek Ry. v. U. S., 263 U. S. 456..... 125
Atty. Gen. of Canada v. Atty. Gen. of Ontario (Re Employment and Social Insurance Act of 1935), Privy Council, Jan. 28, 1937, [1937] 1 Dom. L. R. [P. C.] 684 .....129, 130
Re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act, and Limitation of Hours of Work Act (Privy Council), [1937] 1 D. L. R. 673..... 132
Re Natural Products Marketing Act (Sup. Ct. Can.), [1936] 3 D. L. R. 622 132

Workmen's Comp. Board v. Canadian Pac. Ry., 48 D. L. R. 218 133

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ADDENDUM TO BRIEF FOR APPELLEE.

PART I.

(Continued from p. 60)

THE ALABAMA LAW VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 14TH AMENDMENT.

(q)

The decision in Dayton-Goose Creek Railway Company v. United States, 263 U. S. 456, does not sustain appellants' contention as to due process.

The decision as to the validity of the excess-earnings recapture clause (Sec. 15a) of the Transportation Act of

1920 (41 Stat. 456, 489-91), relied on by the State below, does not sustain Appellants' contention.

Sec. 15(a) of that Act was expressly based on the fact which had confronted the Commission in all of the general rate cases for years, that a general level of competitive rates which would enable the carriers as a whole to survive, would produce excessive revenue for particular carriers in all of the competitive groups. Conversely, if competitive rates were established sufficient to produce only a reasonable return upon the property devoted to the public service by the low cost carrier or the carrier with heavy volume, the other carriers in the competitive group, but no less essential to the area served by them, could not survive.

This had been termed by Senator Cummings the insoluble problem. It was met in principle by Sec. 15(a), which directed the Commission so to adjust the rates in competitive groups as to produce a fair return upon the fair value of the transportation machine in the aggregate. This was accompanied, in effect, by the declaration that, to the extent that such rates in their aggregate effect produce more than a reasonable return for individual carriers, the rates should be regarded as received in trust, recoverable by the Commission for use in furtherance of railway transportation in the interest of the public which (through the Act) had intentionally produced the excess.

Obviously the carriers could not complain of rate regulation which stamped the proceeds of rates, in advance, with a trust subject to the test of aggregate return and in the end left them with no more than a fair and reasonable return, in the aggregate.

The Act *did not* provide that the excess so recovered should be given to the weak carriers, in whose welfare the public (and not, in a constitutional sense, their strong competitors) were interested.

The principle purpose of the Act was the elevation of rates by mandate of Congress to enable the transportation machine, as a whole, to survive the disasters which had

threatened it, not to extract vested earnings from one carrier for payment to another.

Something had to be done with the recaptured fund. It was not practicable to return the fund to the shippers who had produced it. Such return would have been a rebate, an incentive to ship via the line which did not need the traffic, thus further intensifying the problem. Such return to shippers of millions of fractional amounts was from an accounting standpoint obviously impracticable.

Hence Congress covered the excess earnings fund into a transportation fund to be employed for the public benefit in research, experiment, in supplying equipment for lease in case of car shortages, and in loans to carriers, upon adequate security—not gifts at all.

The plan was proposed by the insurance companies, savings banks and fiduciary investing institutions which held vast amounts of railway securities threatened with disaster. They were looking for stabilization of a fair return, not the chance of excessive return to some carriers and starvation for the remainder. To bring about stabilization called for horizontal rate increases in competitive areas. This Congress would not mandate unless accompanied by the recapture clause, because without that mechanism it had always proven that increases merely increased returns that were deemed excessive for particular carriers.

The railway executives with a few exceptions opposed the plan and in inviting the opinion of counsel as to its constitutionality, *before the Act had taken final and proper form*, they stated the case as if the statute were to be a mere transfer of earnings which had unconditionally reached the treasury of the prosperous carriers, and had become their vested property, to other less prosperous carriers.

Based upon that hypothesis distinguished counsel rendered an opinion that the proposal would violate the Fifth

Amendment.* Based on that hypothesis the opinion was undoubtedly sound; but the hypothesis omitted the essential consideration that the excess inherent in the rates was when received expressly impressed with a trust, subject to the test of final results, and never vested in the carrier; nor was the property of one carrier "taken" for another. The provision was merely regulation of rates by an appropriate method.

The hypothesis assumed and therefore the conclusion stated in the opinion mentioned is directly applicable here:

(1) Here there is no regulation of any employment;

(2) Here the funds exacted by the State are the vested property of the employers and are to be paid over to individuals either for their private advantage or, if public, in discharge of an obligation or purpose of the State and not of the employer taxed. In that responsibility the employers subjected to the exaction have no more interest than any member of the public, and can not be singled out to stand the burden alone.**

(3) Neither appellee nor any other employer collects any money, impressed with a public trust, which it pays into the common fund.

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*Hearings—Return of Railroads to Private Ownership, House of Rep., Vol. 3, p. 2981; Library of Cong. No. HE2705, 1919, .A174. Opinion by Hon. Chas. E. Hughes, while at Bar.

**The opinion also (p. 2982) stated that "There is no benefit conferred upon the carriers under the bill which can be regarded as justifying an exaction which otherwise could not be enforced."

c.f. also the distinction, in the opinion, of *Noble State Bank* v. *Haskell* and *Mountain Timber Co.* v. *Washington*.

PART III.

(p)

The decisions of the Supreme Court of Canada and the Privy Council in the matter of the Canadian Unemployment and Social Insurance Law of 1935 and related questions referred under the Supreme Court Act are impressive precedents under the British-North America Act of 1867, establishing a Federal system in Canada, as to the lack of national competence to deal with unemployment insurance, either through a compulsory tax device or under the guise of appropriating national funds.

Pertinent provisions of the British-North America Act of 1867, An Act for the Union of Canada, Nova Scotia and New Brunswick, and the Government thereof; and for purposes connected therewith," March 29, 1867, 30 Vict. Cap. 3, are set out in the margin.*

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*VI—DISTRIBUTION OF LEGISLATIVE POWERS.

Powers of Parliament.

91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit."

[There follow twenty-five other classifications, including navigation, currency and coinage, banking, interest, legal tender, bankruptcy, patents, copyrights, Indians, naturalization, marriage and divorce, concluding as follows:]

"29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces, and any other matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private nature comprised in the Enumeration of Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Canadian Employment and Social Insurance Act, 1935.

The Canadian national Government in 1935 adopted the Employment and Social Insurance Act of 1935 (Can.) c. 38.

The question whether this Act was ultra vires of the Dominion Parliament was referred to the Supreme Court of Canada and by a vote of four to two held to be beyond Dominion competence (1936) 3 D. L. R. 644. On appeal to the Privy Council by judgment delivered January 28, 1937, the judgment of the Supreme Court of Canada was unanimously affirmed* on these grounds:

(1) The substance of Part III of the Act establishes a system of unemployment insurance to be supported in part by Parliament, in part by compulsory contributions from employers and in part by contributions from employes. Provisions of this nature fall within the class of property and civil rights of the Provinces, within the exclusive competence of the Provincial Legislatures.

(2) The legislation can not be sustained under the provisions of the British North America Act (Section 91(a) and (3)), relating to the public debt and property of the Dominion and the power of taxation, the argument for the Act being that the money raised becomes public property and that the

> "Dominion has the complete legislative authority to direct that the money so raised, together with assistance from money raised by general taxation, shall be

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Exclusive Powers of Provincial Legislatures.

92. In each Province the Legislature may exclusively make Laws in relation matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:

* * * * *

2. Direct taxation within the Province in order to the raising of a Revenue for Provincial Purposes. * * *

13. Property and civil rights in the Province. * * *

16. Generally all matters of a merely local or private nature in the Province."

—The Law Reports—Statutes, Vol. 2, 1867, 30 & 31 Vict., London 1867. U. S. Sup. Ct. Library.

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*Sub nom. *Attorney General of Canada* v. *Atty. Gen. of Ontario* [1937], 1 D. L. R. [P. C.] 684.

applied in forming an insurance fund and generally in accordance with the provisions of the Act." (p. 687.)

In rejecting the contention based upon the power of the Dominion to dispose of its property and to appropriate, the Privy Council tersely disposed of two questions relied upon by Appellant in the case at bar both as to the State and Federal Act:

(a) Doubt was expressed whether compulsion applied to an employed person to make a contribution to an insurance fund is in fact taxation, where the benefit is for a period proportionate to the number of contributions.

> "It might seem difficult to discern how it differs from a form of compulsory insurance, or what the difference is between a statutory obligation to pay insurance premiums to the State or to an insurance company." (p. 687.)

(b) Assuming that the Dominion has collected a fund by means of a tax, the Privy Council asserted:

> It may still be legislation affecting the classes of subjects enumerated in section 92, and, if so, would be ultra vires. In other words, Dominion legislation, even though it deals with Dominion Property, may yet be so framed as to invade civil rights within the Province: or encroach upon the classes of subjects which are reserved to provincial competence. It is not necessary that it should be a colourable device, or a pretense. If on the true view of the legislation it is found that in reality, in pith and substance, the legislation invades civil rights within the Province or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the provincial domain. In the present case their Lordships agree with the majority of the Supreme Court in holding that in pith and substance this Act is an insurance Act affecting the civil rights of employers and employed in each Province, and as such is invalid. The other parts of the Act are so inextricably mixed

up with the insurance provisions of Part III that it is impossible to sever them. It seems obvious also that in its truncated form, apart from Part III, the Act would never have come into existence. It follows that the whole Act must be pronounced ultra vires, and in accordance with the view of the majority of the Supreme Court their Lordships will humbly advise His Majesty that this appeal be dismissed" ((1937) 1 D. L. R. at 687.)

The obvious identity between the questions involved rests upon the similarity in essence between the Canadian Constitution established by the Act of 1867 and our own, from which its basic principle of a Federal State was adopted.

This opinion of the Privy Council followed an elaborate opinion expressing their unanimous conclusion [(1937) 1 D. L. R. 673] that the "Weekly Rest in Industrial Undertakings Act," "Minimum Wages Act," and "Limitation of Hours of Work Act," upon which the Canadian Supreme Court had divided equally [(1936) 3 D. L. R. 673], were *ultra vires* of the Dominion Parliament.

This decision also followed a unanimous opinion of the Canadian Supreme Court [(1936) 3 D. L. R. 622] approved on appeal by the Privy Council [(1937) 1 D. L. R. 691] holding *ultra vires* the "Natural Products Marketing Act, 1934 (Can.) c. 57, as amended 1935 (Can.) c. 64," as beyond Dominion competence under the commerce and general welfare clause of the Canadian constitution.

In the latter case the Supreme Court of Canada gave elaborate reconsideration to the cases and announced its conclusion June 17, 1936, (1936) S. C. R. p. 398.

So the entire subject has received the most careful consideration by the Canadian and British courts of last resort.

The majority of the Canadian Court in the case involving the Employment and Social Insurance Act held, *inter alia,* that:

(1) The legislation could not be supported either under the general (residuary) power to make laws for the peace,

order and good government of Canada, or as an exercise of the power to regulate trade and commerce [(1936) 3 D. L. R. at 664];

(2) Nor can it be supported under the "power to raise money by any mode or system of taxation," or "the power to appropriate public money for any public purpose" (p. 665); nor under the public debt or property clause:

> "The provisions for levying contributions for the creation of the Unemployment Insurance Fund are nothing more than provisions to enable the carrying out of the true and only purpose of the legislation. • • • The contributions (or taxes, if they are to be so called) are mere incidents of the regulation" (p. 666).

(3) "It being well understood, and in fact conceded, that there are subject matters falling within the legislative authority of the Provinces, the Dominion Parliament may not, under pretext of the power to deal with its property or to raise money by taxation, indirectly accomplish the ends sought for in this legislation. If it were otherwise, the Dominion Parliament, under color of the taxing power, would be permitted to invade almost any of the fields exclusively reserved by the Constitution to the Legislatures in each Province" (p. 666-7).

(4) The effect of the Act is "to attach statutory terms to the contracts of employment" (Lord Haldane in Workmen's Compensation Board v. Canadian Pac. Ry., 48 D. L. R. 18); and its immediate result is to create civil rights as between employers and employes (p. 667).

(5) The Dominion Parliament can not use its power of taxation to compel the insertion of conditions of that character in ordinary employment contracts (p. 667).

The opinion of the majority restates the necessity under the great decisions interpreting the Canadian constitutional system of getting at the "true nature and character of stat-

utes" at their "pith and substances," that they be scrutinized in their entirety for the purpose of determining whether the results intended lie with the Central Government or the provinces [1936] D.L.R. at p. 666.

The prevailing opinion of Rinfret, J., asserted:

> "I deprecate the idea that the Dominion Parliament may use its power of taxation to compel the insertion of conditions of that character in ordinary contracts between employers and employees" (p. 667).

The conclusion in that case is no less applicable here:

> "• • • the Act submitted to the Court is not a mere encroachment on the provincial fields through the exercise of powers allegedly ancillary or incidental to one of the enumerated powers of section 91; in its pith and substance, it is a direct and unwarranted appropriation of the powers attributed to the legislatures [of the Provinces] by force of Section 92 of the Constitution." (ib., at p. 667.)

The most careful consideration was given by the Canadian Court (1936) 3 D.L.R., beginning at p. 635, and sustained by the Privy Council as the *locus classicus* on the subject, to the question whether, and if so, when, the circumstances of national peril may attain such dimensions as to suspend the normal distinction of powers in SS. 91 and 92 of the Constitution [Privy Council (1937) 1 D.L.R., at p. 683]. Said the latter court, per Lord Atkin:

> "While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure." (ib. at 684.)

Respectfully submitted,

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